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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. [redacted]

THE NORTH AMERICAN COMPANY,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

BRIEF OF ARTHUR A. BALLANTINE AND JOHN P. MACLANE, *AMICI CURIAE.*

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March 30, 1943.

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Statutes Cited.

This case directly involves the validity of a provision of the Public Utility Holding Company Act of 1935 (49 Stat. 803-838; 15 U. S. C. Secs. 79-79z). The Act, and various provisions thereof, are referred to throughout the brief.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Second Circuit was rendered on January 12, 1943, and is reported at 133 F. (2d) 148. It is also printed in the Record on file in this Court (Vol. X, p. 4000, *et seq.*).

The opinions of the Securities and Exchange Commission, rendered April 14, 1942 and June 25, 1942, have not yet been officially reported. They are printed in the Record on file in this Court (Vol. I, p. 73, *et seq.* and p. 207, *et seq.*). The Commission has distributed these opinions as its Holding Company Act Releases Nos. 3405 and 3629.

IN THE

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OCTOBER TERM, 1942.

No. 721.

THE NORTH AMERICAN COMPANY,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF ARTHUR A. BALLANTINE AND JOHN F. MacLANE, *AMICI CURIAE*.

Statement.

The undersigned *amici curiae*, members of the Bar of this Court, represent registered public utility holding companies against which proceedings are pending under Section 11(b) of the Public Utility Holding Company Act of 1935 (hereinafter termed the "Act") before the Securities and Exchange Commission (hereinafter termed the "S. E. C.") and before Federal Courts. Counsel for the petitioner herein, The North American Company (a New Jersey corporation, hereinafter termed "North American"), and the S. E. C., the respondent herein, have consented to the filing of this brief.

The orders of the S. E. C. under review were issued under Section 11(b)(1) of the Act and in substance directed North American to divest itself of all of its assets except securities of Union Electric Company of Missouri (with one or two minor exceptions as to which jurisdiction was reserved) and denied North American's petition for rehearing. The assets ordered divested cost $190,000,000.

The companies we represent contend in the proceedings against them, (1) that Section 11(b) (including Section 11(b)(1) and Section 11(b)(2)) is unconstitutional, in that it does not rest, or even purport to rest, on any federal power, such as the power over interstate commerce, and (2) that Section 11(b) (including Section 11(b)(1) and Section 11(b)(2)) is unconstitutional in that it violates the due process clause of the Fifth Amendment. These are the principal issues on the present appeal, and the above-mentioned contentions made in other pending proceedings by the companies we represent will necessarily be affected by the decision in this case.

The Statutory Provisions Involved.

The Act deals with three distinct and separate subjects, viz., (a) registration (Sections 4, 5), (b) regulation (Sections 6, 7, 8, 9, 10, 12, 13, 15), and (c) disintegration and reorganization (Section 11, of which Section 11(b)(1) here involved is a part).

(a) The *registration* provisions, compelling registration of public utility holding companies and the furnishing of detailed information regarding them and their subsidiaries, rest on the power of Congress to obtain such data. *Electric Bond and Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, at p. 442 (1938). No attack on the registration provisions of the Act is being made.

(b) The *regulation* provisions governing future activities (*i. e.*, after passage of the Act), such as issuance and sale of securities through use of instrumentalities of interstate commerce or the mails, may rest on the federal power over such commerce. These regulatory provisions seem to cover almost every important activity of companies in holding company systems which could have any connection with interstate commerce. No attack on the regulatory provisions of the Act is involved here.

(c) The *disintegration and reorganization* provision (Section 11), a part of which is here involved (that is, Section 11(b)(1)), makes no reference to any matter on which any federal power rests, and does not provide for regulation of any future activity, but for changes in existing property rights. *Revisions contemplated by Section 11 are not to be ordered because of violations of any law or statutory prohibition or because of the insolvency of any company, but for the sole purpose of creating theoretically ideal corporate and operating structures in the public utilities field.* Section 11(a) provides for studies by the S. E. C. of public utility holding company systems. Section 11(b)(1) provides for divestment by holding company systems of a part of their holdings, so as to accomplish economic integration and to disintegrate presently existing holding company systems. Section 11(b)(2) provides for making changes in corporate structures and the voting rights of security holders.

Section 11(b)(1) involved here reads as follows:

> "It shall be the duty of the Commission [the S. E. C.], as soon as practicable after January 1, 1938:
>
> "(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find neces-

sary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, however,* That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

"(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

"(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

"(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems."

It will be noted that Section 11(b)(1) relates to *registered* holding companies (meaning holding companies registered under Section 5 of the Act) and to each subsidiary

company thereof. However, the constitutional right to apply Section 11(b)(1) to any company or its system is not determined by *registration* by the company. This was expressly held by this Court in *Electric Bond and Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419 (1938), *supra*. Under that decision, holding companies were required to register under Section 5 of the Act and to furnish information regarding themselves and their subsidiaries required in connection with such registration. However, the Court expressly said (p. 435) that such "registration will be without prejudice to future challenge of the validity of any provision of the Act, or requirement of the Commission," outside of the registration provisions. This decision shows that (a) the registration, (b) the regulation, and (c) the disintegration and reorganization, functions of the Act are entirely separate from each other.

There is no provision in Section 11, the disintegration and reorganization section, limiting the application of the Section to companies engaged in interstate commerce or which affect interstate commerce, and there is no such provision elsewhere in the Act.

There is no provision in Section 11 or elsewhere in the Act for a condemnation proceeding, or for just compensation to a holding company and its security holders for the loss which will result from the taking of property of the company through an order for divestment of assets.

There is no provision in Section 11 or elsewhere in the Act limiting the application of the Section to companies which are insolvent and therefore subject to the bankruptcy power of the Federal Government and to compulsory reorganization and liquidation.

There is no provision in Section 11 or elsewhere in the Act granting security holders of companies against which

proceedings are instituted under Section 11 the right to a hearing before the S. E. C. or before any Court, and no provision for the vote or consent of such security holders to any so-called reorganization under the Section.

The Decision Below and the Errors Therein.

The decision of the Court below, 133 F. (2d) 148 (C. C. A. 2nd, Jan. 12, 1943), while upholding Section 11(b)(1) as a valid exercise of federal power over interstate commerce, really supports our position that Section 11 has scope beyond any federal power, and is based on a misconception of exemptions contained in Section 3 of the Act, a matter discussed in Point I below.

The Court below also held that the divestment order did not involve a taking of property without due process, on reasoning clearly erroneous, as will be shown hereinafter in Point II.

The Structure Upon Which the S. E. C. Operated.

Here we have in North American a typical public utility holding company, through which thousands of people obtained a diversified investment in the securities of public utility operating companies located in different parts of the country. In this case, these public utility companies were located in Wisconsin, Missouri, Ohio, the District of Columbia, Michigan and California.

The securities of which North American has been ordered to divest itself cost it $190,000,000. There is a value to North American and to its security holders inherent in the assemblage of these securities over and above the value of each of the items taken separately. Through such assemblage, the investors of North American obtained the advan-

tage of diversification of their investment, and the additional advantage of having an experienced management watch and protect the investments in the operating companies. Moreover, North American and these investors obtained the advantage, under the federal income tax laws, of the filing of consolidated income tax returns for these various companies. Also, thousands of investors purchased senior securities of the subsidiary public utility companies, undoubtedly in reliance on the ownership by North American of the common stocks of such subsidiaries and the reputation of North American for experience and success in the public utility field.

North American does no business except to supervise these investments. It is eminently solvent, there has never been a default on any security issued by North American, and it is not claimed that North American has violated any law in acquiring its property.

The above facts are not contested.

Yet by order of a federal administrative agency, this $280,000,000 solvent corporation, lawfully created and existing, is ordered to divest itself of $190,000,000 of securities not acquired in violation of any law at the time in effect, with the consequent taking of a large amount of property belonging to the corporation and its public security holders, without regard to whether the company is in interstate commerce or has any effect on interstate commerce or whether the divestment affects interstate commerce, without any proceeding for condemnation and payment of just compensation, without any hearing whatever for its security holders, and without obtaining their vote or consent. This is done ostensibly for the sole purpose of creating for the general public benefit a theoretically ideal structure in the public utility field.

Summary of Argument.

We submit that there is a fundamental lack of power in the Federal Government to enact this statute applying to companies, irrespective of their being in, or affecting, interstate commerce (Point I); that the taking of the property rights of North American and its stockholders without any proceeding for condemnation and payment of just compensation is a violation of the due process clause of the Fifth Amendment (Point II(1)); that to compel a solvent corporation, which is not subject to the bankruptcy power and has not violated any law, to go through involuntary reorganization or partial liquidation is also a violation of the due process clause (Point II(2)); that the reorganization statute here involved further violates the due process clause in that it does not contain the minimum safeguards for security holders required even for an exercise of the bankruptcy power (Point II(3)); and that, if Section 11(b)(1) is sought to be sustained by alleged abuses (which were not violations of law) occurring prior to its enactment, the Section violates the due process clause as in effect the enforcement of an *ex post facto* law (Point II(4)).

Our position is not that the Federal Government cannot take any action with respect to these corporations. We think that the Federal Government constitutionally may take (a) action to regulate activities properly found to affect interstate commerce, including, on the analogy of the Sherman Anti-Trust Act, the putting together in the future of properties in, or affecting, such commerce, (b) again on the analogy of the Sherman Anti-Trust Act, in case properties were combined in violation of a law (such as the Act) existing at the time the combination was made, action to put asunder the properties so combined in violation of law, and

(c) action to condemn and take, upon payment of just compensation, property rights of corporations and their security holders for a public purpose connected with a federal power (such as interstate commerce), after proper hearings for such corporations and their security holders.

Section 11 here involved does not lie within any of these types of action.

ARGUMENT.

I. Section 11(b)(1) does not rest, or purport to rest, on any federal power, such as the power over interstate commerce, and is therefore unconstitutional.

The discussion under this Point is not on the question whether any particular companies, either the company involved in this case or others, are engaged in activities in interstate commerce or affect interstate commerce so that such activities or such effect may be the subject of federal legislation under an act passed for that purpose. That general question has been the subject of much recent litigation, resulting in decisions holding that many activities, not previously considered as affecting interstate commerce to the required extent, do affect it sufficiently for federal legislation. Those decisions are not in any respect challenged here.

The point we are discussing is the entirely different one, whether Section 11(b)(1) provides for divestment of assets by holding companies in the public utility field, irrespective of whether the companies themselves are in, or affect, interstate commerce, or the divestment affects interstate commerce. It is clear that Section 11(b)(1) does so.

Therefore, Section 11(b)(1) is not an exercise of the federal power over interstate commerce and (since it can-

not even be claimed to rest on any other federal power) Section 11(b)(1) is invalid. To establish a valid connection between a statute and a federal power the statute must not merely be one which could operate on a subject matter of federal power. The statute must be confined to the subject matter of federal power and its scope must not be such as to operate on all situations in a category, when some of them are not within the ambit of federal power.

In *Hill* v. *Wallace*, 259 U. S. 44 (1922), this Court held invalid a purported tax imposed by Congress on sales of grain for future delivery on the ground that the tax was really a penalty to coerce action by boards of trade and their members and was not an exercise of the taxing power. The Court then went on to consider whether the statute could be supported as an exercise of the commerce power. The Court held that, to do so, something had to be found in the Act confining its application to interstate commerce and said (p. 68):

> "There is not a word in the act from which it can be gathered that it is confined in its operation to interstate commerce."

There was no dissent from this decision of the Court, Mr. Justice Brandeis writing a concurring opinion in which he agreed that the Act was unconstitutional.

In *The Employers' Liability Cases*, 207 U. S. 463 (1908), this Court said (p. 504):

> "Concluding, as we do, that the statute, whilst it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power, and that the two are so interblended in the statute that they are incapable of separation, we are of the opinion that the courts below rightly held the statute to be repugnant to the

> Constitution and non-enforcible; and the judgments below are, therefore, *Affirmed.*"

In that case, the dissenting justices agreed that, if the statute embraced objects beyond federal power, it was unconstitutional, saying (p. 509):

> "Which interpretation, then, should be adopted? That which regards the law as prescribing the liability of the carrier only to those employés who are engaged in the work of interstate and foreign commerce, or that which extends the benefits of the law also to those employés engaged in work which has no relation whatever to such commerce. In answering this question it must not be forgotten that, if the latter interpretation be adopted, *in the opinion of the whole court the act is beyond the constitutional power of Congress.*" (Italics ours.)

In order to sustain a federal statute as constitutional, the connection of the statute with a federal power, if not plain from the nature of the statutory provisions, must be established (a) by a finding of Congress which the Court decides to be proper, or (b) by a finding of an administrative body or officer, authorized and directed by Congress to make the finding in each instance of the exercise of its or his authority, which finding the Court decides to be proper, or (c) by decision of the Court, unassisted by any finding of Congress or of an administrative commission, that the connection appears from the operative provisions of the statute.

In the case of Section 11(b)(1), there is no plain connection with any federal power; and Congress made no finding to connect the subsection with any federal power, the S. E. C. was not directed to make, and did not make, any such finding, and this Court, upon inspection of the

subsection and related provisions of the Act, will see for itself that the operation of this statute is plainly not an exercise of the commerce power or any other federal power and is not in any way limited in its effect to interstate commerce or matters affecting interstate commerce.

It is not the scheme of the Act to bring companies within the application of Section 11(b)(1) by reason of their being in interstate commerce or affecting interstate commerce. On the contrary, it is sought to bring *all* public utility holding companies and their subsidiaries under the application of Section 11(b)(1), irrespective of their being in interstate commerce or affecting interstate commerce and irrespective of whether their subsidiaries are in interstate commerce or affect interstate commerce. The principal method attempted is to forbid to any holding company or any subsidiary thereof the use of the mails and instrumentalities of interstate commerce unless the holding company registers with the S. E. C. and thereby subjects itself and *all* its subsidiaries to the application of Section 11(b)(1) and thus to the exercise of a power which the Federal Government does not have. The power of the Federal Government over the mails and instrumentalities of interstate commerce cannot constitutionally be made a means of exercising powers which the Federal Government does not have over companies which use them. *A fortiori*, the power over such instrumentalities cannot constitutionally be made the means of exercising power over companies which do not even use them, *i. e.*, companies embraced, through the statutory definitions, in the same holding company system with another company which does make some use of the mails or instrumentalities of interstate commerce.

An order under Section 11(b)(1) is not "regulation" either directly or incidentally, nor a penalty for any violation of law. The function of the subsection is not regula-

tory, but is solely to take away existing property rights not acquired through violation of any federal law. Viewing Section 11(b)(1) from the standpoint of its place in the whole Act, it is part of Section 11, which is the disintegration and reorganization provision of the Act. Section 11 has no relationship in function to the regulatory provisions (Sections 6, 7, 8, 9, 10, 12, 13, 15) or the registration provisions (Sections 4, 5) of the Act. Subsection (a) provides for studies of public utility systems by the S. E. C. Subsection (b)(1) provides for divestment by holding companies of holdings in public utility companies so that they will ordinarily be left with only one integrated system. Under subsection (b)(2), steps are to be taken to change corporate structures in the public utility holding company field, so that the structure of a particular holding company system which the S. E. C. finds to be "unduly or unnecessarily complicated" shall no longer be so, and so that voting power which the S. E. C. finds to be "unfairly or inequitably distributed" among security holders of the system shall no longer be so distributed. Thus Section 11(b)(1) provides for the taking of property rights of solvent corporations not acquired by them in violation of any law. Certainly, for Congress to enact such a statute unconnected with any of the federal powers would be unconstitutional. Therefore, for such a statute to be valid, one prerequisite is that the statute be applicable only to situations which fall within one of the federal powers, such as the power over interstate commerce. Section 11(b)(1) is not so limited and is therefore outside the scope of federal power.

We will now discuss (1) the decision of the Circuit of Appeals for the Second Circuit in this case. We will then discuss (2) the provisions of Section 11(b)(1), and of related sections, to show that the federal power over

interstate commerce is not used to bring companies under Section 11(b)(1), and (3) the impossibility of sustaining Section 11(b)(1) as a regulation of the use of the mails or instrumentalities of interstate commerce.

1. The decision below supports our position as to the scope of Section 11, but erroneously upholds Section 11(b)(1) on a misconception of the exemptions in Section 3(a).

North American argued below that Section 11(b)(1) did not rest on any federal power, such as the power over interstate commerce. The Circuit Court of Appeals in effect conceded that Section 11(b)(1) was drawn so as to include companies not in, or affecting, interstate commerce and subject to the federal power over interstate commerce, for the Court upheld Section 11(b)(1) on the ground that (133 F. (2d), at p. 153) "Section 3 provides administrative procedure by which a holding company can obtain exemption from any provision of the Act, if it and its subsidiaries are predominantly intrastate in character," and that North American had not availed itself of this opportunity for exclusion from the operation of Section 11(b)(1).

Thus the Court held, in effect, that the provisions of Section 3 afforded exemption to a company not in, and not affecting, interstate commerce. This is clearly incorrect and therefore the decision below cannot be supported.

Section 3 does not give exemption to any company on the ground that it is not in, or does not affect, interstate commerce. The test of exemption is quite different and has no relation to any federal power. The Court below, in a footnote to the statement just quoted, refers to subdivisions 1 and 2 of subsection (a) of Section 3.

The introductory clauses of subsection (a), preceding subdivisions 1 and 2 and all other subdivisions, contain a

condition precedent to exemption under any of the subdivisions, which has no relation whatsoever to interstate commerce or any other federal power. That condition precedent is that the S. E. C. shall not find "the exemption detrimental to the public interest or the interest of investors or consumers." It must be reiterated that this is a condition, irrespective of whether the company seeking exemption is in interstate commerce or affects interstate commerce. The existence of this particular condition is alone enough to destroy the reasoning of the Court below based on Section 3(a).

But subdivision 1 of Section 3(a) contains a further condition having no relation to interstate commerce or any other federal power. The holding company which is seeking exemption, and *every* public utility subsidiary company thereof from which it gets income must carry on business "substantially in a single State *in which such holding company and every such subsidiary company thereof are organized.*" These companies might all be doing an intrastate business solely; but the mere fact of organization of one of them or its doing business in a state different from the state in which another is organized and is doing business destroys the chance of exemption, notwithstanding that each corporation is doing a purely intrastate business.

The other subdivision of Section 3(a) referred to by the Court below, subdivision (2), is not available to an ordinary holding company, but only to a holding company which is predominantly a public utility operating company.

Therefore the two subdivisions to which the Court below drew attention as upholding its reasoning not only do not do so, but support our contention here.

Accordingly, the decision below is founded on a clear mistake as to the exemptions in Section 3(a), and gives

little aid to this Court in determining whether any part of Section 11 rests on any federal power. If anything, it is a holding that, except for any bearing the misconstrued exemption may have, Section 11 is not confined to any subject matter of federal power.

2. Through the operation of related sections of the Act, Section 11(b)(1) applies to companies whether or not they are in interstate commerce or affect interstate commerce in any degree, or even use the mails or instrumentalities of interstate commerce.

Take a dozen public utility operating companies having no connection with each other, 10% of the voting shares of each of which are owned by another company doing nothing but owning and voting such shares. *We will show that each of these companies is fully subject to Section 11(b)(1) by reason of artificial provisions in the Act, irrespective of whether the company owning such shares is in interstate commerce or affects interstate commerce or even uses the mails or any instrumentality of interstate commerce, and irrespective of whether any of the other companies engage in or affect interstate commerce.*

It is therefore clear that this federal statute was drawn with a broad application unconnected with interstate commerce or any other federal power. The basis on which the draftsmen obviously hoped that so broad a statute might be sustained was that registration (which subjects companies to Section 11(b)(1) by statutory definition), although compelled as a practical matter by the devices in the Act, would be regarded by the Courts as at least *theoretically* optional (the option being to go out of business) so that the Courts would accept registration as submission and not review the compulsion exerted. However, after passage of the Act and before *Electric Bond and Share Co.*

v. *Securities and Exchange Commission*, 303 U. S. 419 (1938), was decided by this Court, this theory was abandoned by the S. E. C. and the Government attorneys representing it, for the reason that they wished to argue that the registration provisions were separable from the remainder of the Act. (It seems to us that this position as to the separability of the registration provisions could only have been adopted because of recognition of the vulnerability of Section 11 to attack in respect of its constitutionality.) In that case this Court held that registration was not voluntary and that, notwithstanding registration, companies could contest the validity of other provisions of the Act, including Section 11(b)(1). Stripped of the artificial theory that registration was voluntary, Section 11(b)(1), to be valid, must be found to rest on some federal power. However, study of the Act shows that the subsection does not rest on any such power.

The relevant sections of the Act which will now be examined are (a) Section 11(b)(1), and sections tied to it by cross-reference, (b) Section 1, containing the declaration of policy by Congress, and (c) Sections 4 and 5, the registration sections of the Act, which make Section 11(b)(1) applicable to a company.

(a) Section 11(b)(1), and cross-referenced sections.

Nowhere in Section 11(b)(1) or in the whole of Section 11 is there any reference to any matter on which any federal power found in the Constitution rests. Consequently, on the face of the subsection there is no indication that its application is based on any federal power.

Section 11(b)(1) becomes applicable to a company solely through inclusion of a company by definition in the terms used in Section 11(b)(1). The subsection is applicable to "each registered holding company, and each subsid-

iary company thereof." An examination of the definitions of such terms which are all contained in Section 2 of the Act shows that they bring companies under Section 11(b)(1) irrespective of whether the companies are in, or affect, interstate commerce, and irrespective of any other matter of federal power.* For companies to be brought under Section 11(b)(1) through these definitions there need only be a public utility operating company, 10% of the stock of which is held by another company, which has registered under the Act. There is no mention of interstate commerce.

Not only is there no *inclusion* of companies in the definitions, based on such companies being in, or affecting, interstate commerce, but the *exemptions* provided in these definitions are not such as would permit any company otherwise included in any definition to obtain exclusion from the definition, and therefore from the application of Section 11(b)(1), based on its not being in, or affecting, interstate commerce.**

Nor does the definition in Section 2(a)(29)(A) of an

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* A "holding company" (Section 2(a)(7)(A)) is any company which directly or indirectly owns, controls, or holds with power to vote, 10% or more of the outstanding voting securities of a public utility company or of a company which is itself a holding company. A "public-utility company" is an electric (or gas) utility company (Section 2(a)(5)). An "electric (or gas) utility company" is a company which owns or operates facilities for the generation or transmission of electric energy for sale (or for the retail distribution of gas) (Section 2(a)(3) and (4)). A "registered holding company" is any company which is registered under Section 5 (Section 2(a)(12)). A "subsidiary company thereof" is a company, 10% of the voting securities of which are owned by such registered holding company or a subsidiary thereof (Section 2(a)(8)(A)). In these definitions, there is no reference to interstate commerce or any other matter of federal power.

** Sections 2(a)(3), 2(a)(4), 2(a)(7) and 2(a)(8). Even an electric utility company operating within a single state cannot obtain exemption unless other conditions having no relation to interstate commerce or any effect thereon are present (Section 2(a)(3)(B)).

"integrated public-utility system", to which a holding company system is, generally, required to be reduced under Section 11(b)(1), limit the application of Section 11(b)(1) to matters affecting interstate commerce.*

(b) Section 1, containing the declaration of policy by Congress.

Nowhere in Section 1 of the Act, which declares the policy of Congress, is there any finding that all holding companies and their subsidiary public utility operating companies, whether registered or not, are in, or affect, interstate commerce.

On the contrary, the only statements are that holding companies of public utility operating companies "often" affect interstate commerce and that their subsidiary public utility companies "often" sell and transport gas and electricity through instrumentalities of interstate commerce (subsection (a)).

Clauses (1) to (3) of subsection (a) refer to activities which are "often" or "widely" carried on by public utility holding companies and their subsidiaries by means of the mails or instrumentalities of commerce such as sale of secu-

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* The definition of "integrated public-utility system" (Section 2(a)(29)(A)), relating to electric utility companies, reads as follows:

> "As applied to electric utility companies, a system consisting of one or more units of generating plants and/or transmission lines and/or distributing facilities, whose utility assets, whether owned by one or more electric utility companies, are physically interconnected or capable of physical interconnection and which under normal conditions may be economically operated as a single interconnected and coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation;"

rities, performance of service contracts or sale and transport of gas and electricity. But this does not tie Section 11(b)(1) to any federal power over interstate commerce, because Congress did not direct the S. E. C., in applying Section 11(b)(1), to limit its application to activities carried on by means of the mails or instrumentalities of interstate commerce, or to companies engaged in, or affecting, interstate commerce, or even to companies using such instrumentalities. Furthermore, Section 11(b)(1), with which we are solely concerned here, does not purport to be a regulation of any of the matters referred to in clauses (1) to (3). Section 11(b)(1) relates solely to economic integration. The three activities mentioned in clauses (1) to (3) of Section 1(a) are directly regulated by other sections of the Public Utility Act of 1935,* namely, sale of securities by Title I, Sections 6 and 7, service contracts by Title I, Section 13, and sale and transport of electricity by the Federal Power Commission under Title II. (In addition, the Federal Power Commission regulates the sale and transport of natural gas under the Natural Gas Act.) Obviously the recitals of these three clauses of Section 1(a) are intended, and can be taken, as support only for the regulatory provisions just mentioned and not for Section 11(b)(1).

Clause (4) of Section 1(a) states that the practices of public utility holding companies and their subsidiaries "in respect of and control over subsidiary companies *often* materially affect the interstate commerce in which those companies engage." This clause does not tie Section 11(b)(1) to any federal power over interstate commerce

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* Title I of the Public Utility Act of 1935 is the Public Utility Holding Company Act of 1935, and Title II consists, in part, of the Federal Power Act.

for the same reason the preceding clauses (1) to (3) do not. Section 11(b)(1) is applied to each company in a registered holding company system whether or not the control of the company materially affects interstate commerce, and there is no requirement that the S. E. C. find that a company to which it applies Section 11(b)(1) does materially affect interstate commerce, or that the company or any subsidiary thereof is engaged in interstate commerce.

The final clause (5) of Section 1(a) has no reference to interstate commerce or any federal power. It states in substance that the activities of public utility holding companies and their subsidiaries extend over many states and that state control over public utility companies has not been effective. But it has never been held that the fact that activities took place in more than one state gave rise to any federal power over such activities, if they did not constitute interstate commerce or did not have a substantial economic effect on interstate commerce. It is also certain that the mere holding by individuals resident in one state or by a corporation, incorporated under the laws of that state, of stock in a corporation or corporations organized under the laws of another state or states does not give rise to any federal power. Nor has it ever been held that alleged ineffectiveness or laxity of state control *per se* is a source of federal power to supplement that control. Otherwise, whenever the Federal Government considered that state control of any matter, however local, was ineffective or inefficient, it could undertake regulation thereof. Consequently, this clause (5) does not in any way tie the application of Section 11(b)(1) to any federal power.

Since the declaration in subsection (a) is no more than a statement that public utility holding companies and their subsidiaries "often" engage in interstate commerce or

"often" affect interstate commerce and that such activities of public utility holding companies and their subsidiaries as extend over more than one state are not susceptible of effective state control, one would expect the Act to provide that the S. E. C. should find that the particular companies to which it applies Section 11(b)(1) are actually engaged in, or do affect, interstate commerce. There is, however, no such provision in the Act. No generalization of this kind can be made the basis for S. E. C. power, granted by Section 11(b)(1), to compel a holding company or any of its subsidiaries to divest itself of valuable assets, irrespective of whether the particular companies involved themselves engage in interstate commerce or affect interstate commerce or whether the divestment affects interstate commerce.

If subsection (a) of Section 1 represented a proper foundation for Section 11(b)(1), it would follow that Congress could pass a statute saying that it finds that corporations in general "often" engage in interstate commerce and "often" extend their activities into more than one state, that abuses have arisen in connection with corporations in general, and that, therefore *all* corporations may be compelled to divest themselves of the bulk of their assets. Similarly, it would follow that Congress could enact a statute reciting that it finds that persons engaged in business, whether corporations or partnerships or individuals, "often" use the mails and other instrumentalities of commerce, that abuses have arisen in connection with business operations as shown by bankruptcy proceedings, Federal Trade Commission proceedings, mail fraud proceedings and Congressional investigations, and that Congress had therefore determined, for the purpose of preventing further occurrence of the alleged abuses, to reduce the size of

corporations and other business units to some limited amount. Certainly, no one will claim that Congressional power extends so far. As a minimum requirement (even apart from the protection afforded by the due process clause), such statute would have to have a provision directing the administrative body in charge to find that the subject companies or persons are in, or affect, interstate commerce or that the changes which are required affect interstate commerce.

The statement in subsection (c)* that it is the policy of the Act to meet the problems and eliminate the evils, as enumerated in Section 1, connected with those public utility holding companies "*which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce*" is a clear recognition by Congress that the Act must rest on a matter of federal power, to wit, the power over interstate commerce, and that the operative provisions of the Act, to be valid, must be limited in their application to companies engaged in interstate commerce or in activities which directly affect or burden interstate commerce. But Section 11(b)(1) and related sections contain no such limitation. Nor, as previously stated, is the S. E. C. required by the Act to make any finding in that regard.

There are references in subsections (a) and (b) of Section 1 to the "national public interest". But no one has yet claimed successfully in any Court that the "national public interest" as such and alone and unrelated to any enumerated federal power gives rise to any federal power, except possibly in connection with spending under the gen-

* Subsections (a) and (c) are the only subsections of Section 1 which contain any reference to any matter of federal power. Subsection (b) of Section 1 contains no reference whatever to any matter of federal power but consists only of a list of alleged abuses by public utility holding companies.

eral welfare clause of the taxing powers in the Constitution.*

Accordingly, Section 1 of the Act simply contains no finding or declaration tying the application of Section 11(b)(1) to any federal power.

(c) The registration provisions of the Act, Sections 4 and 5.

As already stated, the draftsmen of the Act obviously realized the existence of the gap between the recitals of Section 1 and the provisions of Section 11(b)(1), which are not limited in their application to matters involving interstate commerce in any manner, and relied, for bridging the gap, on the artificial device of making registration in form voluntary although, as a practical matter, it was compulsory. After passage of the Act, the S. E. C. and the Government attorneys representing it decided not to rely on this device, and this Court in the registration case already referred to, *Electric Bond and Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419 (1938), held that a company, notwithstanding its registration, could raise the question of the validity of sections of the Act other than the registration provisions.

As the Act is drawn, holding companies become subject in terms to Section 11(b)(1) through registration, since Section 11(b)(1) applies to each "registered holding company." To make it impossible for the holding companies

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* As the Supreme Court said in *U. S.* v. *Butler*, 297 U. S. 1 (1936), at page 74:

> "It does not help to declare that local conditions throughout the nation have created a situation of national concern; for this is but to say that whenever there is a widespread similarity of local conditions, Congress may ignore constitutional limitations upon its own powers and usurp those reserved to the states."

The dissenting opinion in that case, although disagreeing with the decision in the case, did not disagree with this proposition.

not to register under Section 5, provisions were inserted in Section 4(a) which would prevent the holding companies from carrying on business at all without registering, irrespective of the connection of the holding companies with interstate commerce. But, under this Court's decision, the various sections of the Act are separable, and a holding company, finding it impossible to carry on because of the provisions of Section 4(a) without registering under Section 5 (or being compelled to register under Section 5 through the provisions of Section 4(b) which is a "catch-all" clause later herein to be discussed), can register and, notwithstanding such registration, still contest the validity or application of any other sections of the Act. This Court said (303 U. S., at p. 443): "All their rights and remedies with respect to other provisions of the statute remain without prejudice."

Is there, nevertheless, such a necessary chain of connection between the provisions of Section 4 forcing registration and some source of federal power that Section 11(b)(1), when applied to holding companies forced to register by Section 4, is confined to a matter on which the Federal Government has power to legislate? There is no such connection.

Section 5 merely contains the mechanics of registration, and there is no designation or classification therein of the companies required to register. That is contained in Section 4, which has two subsections, (a) and (b).

Analysis of Section 4(a) shows clearly that it requires registration by holding companies irrespective of their being in, or affecting, interstate commerce and thereby subjects to Section 11(b)(1) not only such holding companies but each of their subsidiaries irrespective of whether either the holding company or the subsidiary is in, or affects, inter-

state commerce, or even uses the instrumentalities of interstate commerce at all.

The key to the broad scope of Section 4(a) is clause (6) which, taken together with the introductory clause of Section 4(a), requires a holding company to register (thereby making *that holding company and all* its subsidiaries subject to the application of Section 11(b)(1)) if *any* company in which the holding company holds 10% of the voting shares uses an instrumentality of interstate commerce or the mails incidentally even to a single isolated transaction of various types, for example, to enter into or take any step in the performance of any advisory service contract, or to sell goods to any public utility or holding company (whether or not the buyer is in interstate commerce) (clause (2)), or to sell a utility security to the public or an underwriter (clause (3)), or to purchase any utility security or assets from anyone (clause (4)). Consequently, if there are a dozen public utility operating companies, 10% of the stock of each of which is owned by a holding company, and *one* of the operating companies uses an instrumentality of interstate commerce to take *any* step in the performance of a sale of goods to any public utility company, the holding company must register and *it and all* its subsidiaries are subject to the application of Section 11(b)(1). Under the remaining clauses, (1) and (5), if a holding company wishes to engage directly in transmission of electricity or gas in interstate commerce, or in any kind of business in interstate commerce, it must register, but this is only one of the myriad ways in which a company is brought under Section 11(b)(1) through the operation of Section 4(a). Even in the case of clause (5), the effect of registration of the holding company, because of a desire itself to engage in some kind of business in interstate com-

merce, is to subject *all* its subsidiaries to the application of Section 11(b)(1), irrespective of their engaging in, or affecting, interstate commerce, or even of their using any instrumentality of interstate commerce.

There is another aspect of these clauses of Section 4(a) aside from their subjecting to Section 11(b)(1), by indirection, companies not connected with interstate commerce, or with the use of any instrumentality of interstate commerce, which also shows that Section 11(b)(1) does not rest on the federal power over commerce. Section 4(a) requires registration as a condition of using, for the purpose of an *isolated* transaction, instrumentalities over which the Federal Government may exercise control. But the result of such registration is to subject companies to the application of Section 11(b)(1) *forever after*, notwithstanding completion of such isolated transaction and irrespective of whether they are engaged in, or affect, interstate commerce, or thereafter use any instrumentality of interstate commerce.

While *some* (not all) of the causes of registration may have to do with use by one company of an instrumentality of commerce (or the mails) in the first instance, Section 11(b)(1), because of registration of a holding company, applies to other companies (which are subsidiaries of the holding company by statutory definition) irrespective of the use by such other companies of any instrumentality of commerce (or the mails) and application of the subsection continues although the particular use by the first company which caused registration has stopped (*e. g.*, sale of a block of utility securities held in its portfolio). There is no connection whatever between a company engaging in the isolated transactions described in Section 4(a) which at one time may have compelled registration by a company holding 10% of its stock, and the *subsequent* impact of Section

11(b)(1) on the first company or the holding company or *another* so-called subsidiary of that holding company, since the subsection remains effective notwithstanding that the transactions which compelled the registration have wholly ceased. It is no answer to this to argue that, if a company ceases to engage in such transactions or is not in, or does not affect, interstate commerce, it may apply to the S. E. C. to terminate its registration under Section 5. There is no provision for doing so in the Act. The only ground for terminating registration is contained in subsection (d) of Section 5, namely, that a registered holding company has ceased to hold as much as 10% of the voting stock of each of the companies in which it formerly held 10% or more of the voting stock and has thereby ceased to be a holding company.*

The conclusion is unavoidable that when there is included in the field of action of Section 11(b)(1), through the operation of Section 4(a), each holding company and each of its subsidiary companies, whether or not such company is in, or affects, interstate commerce, or uses any

* The S. E. C. does not even let out from under the Act through Section 5(d) companies which have for all practical purposes ceased to be holding companies. For instance, in *In the Matter of North American Gas and Electric Company* [which is in no way connected with the petitioner herein] Holding Company Act Release No. 4092, February 5, 1943, the S. E. C. denied an application of a company under Section 5(d) when its only reason for being a holding company was its ownership of the worthless common stock of a bankrupt public utility company. The application was accompanied by another application for permission to surrender this worthless common stock to the trustees in bankruptcy of the public utility company. The applicant holding company had a number of other assets which were not utilities. The S. E. C. refused to permit the worthless stock to be surrendered on the ground that this would render the Act no longer applicable to the applicant. Having retained jurisdiction through its refusal to permit the applicant to surrender worthless stock of the company in bankruptcy, and in face of the fact that for all practical purposes the applicant was no longer a holding company under the Act, the S. E. C. then decided that, under Section 11(b)(2), it would be a good thing to order the dissolution of the applicant, and proceeded to do so.

instrumentality thereof, Section 11(b)(1) is not a regulation of interstate commerce.*

Nor does the compulsion to register exerted through subsection (b) of Section 4 have any relation to any matter of federal power, except, as in the case of subsection (a), to form a basis for requiring the furnishing of information through registration as an aid to Congress in determining upon legislation on the subject of sales of securities through the mails or instrumentalities of interstate commerce. Subsection (b) requires every holding company to register under Section 5 which has outstanding any security which had been distributed subsequent to January 1, 1925, by use of the mails or any instrumentality of interstate commerce and which was owned or held on October 1, 1935, by persons other than residents of the state of incorporation. Companies within the classification of subsection (b) of Section 4, having sold securities in interstate commerce within 10 years, would reasonably be in a position to furnish information which might be useful to Congress in connection with legislation with respect to such sales in the future. However, the distribution of a security by a company ten years before the passage of the Act by the use of the mails or the instrumentalities of interstate commerce

* This conclusion is reenforced by noting that Section 11(b)(1) does not purport to be a regulation of any companies *in respect of any of the activities* set forth in Section 4(a) which compel the registration, even of those companies which make use of the mails or the instrumentalities of commerce. On the contrary, such activities are specifically the subject of regulation by other sections of the Act and other statutes. The Federal Power Commission, under the Federal Power Act, which is part of Title II of the Public Utility Act of 1935, and under the Natural Gas Act, regulates the distribution of gas and electricity referred to in clause (1) of Section 4(a) of the Act. Section 13 of the Act regulates the performance of service contracts referred to in clause (2) of Section 4(a). Sections 6 and 7 regulate issuance of securities referred to in clause (3) of Section 4(a). Sections 8, 9 and 10 regulate the acquisitions referred to in clause (4) of Section 4(a).

can have nothing to do with applying Section 11(b)(1) to that company as engaged in interstate commerce or affecting or burdening interstate commerce in the year 1935 and thereafter. It certainly cannot be the basis of applying Section 11(b)(1) to another company merely because the first company owns 10% of its voting shares. Yet through the registration under Section 5 compelled by subsection (b) of Section 4, Section 11(b)(1) purports to operate on companies solely because they, or some other company which happens to own 10% or more of their voting stock, sold securities in that way at that early date.

It has been shown that Section 11(b)(1) does not rest on the federal power over interstate commerce, since it applies to companies irrespective of whether they are engaged in interstate commerce or affect interstate commerce, and irrespective of their use of the instrumentalities of interstate commerce or the mails. It will be shown below that Section 11(b)(1) cannot constitutionally be applied even to companies which do use the instrumentalities of interstate commerce or the mails, merely because of such use.

3. Section 11(b)(1) cannot be sustained as a regulation of the use of the mails or instrumentalities of interstate commerce.

It cannot be argued that Section 11(b)(1) rests on federal power over the use of the mails or the instrumentalities of interstate commerce, simply because the federal power over the mails and instrumentalities of interstate commerce was used in Section 4(a) to compel holding companies to register and thereby bring themselves and all their subsidiaries within the wording of Section 11(b)(1) as registered holding companies. Not only is this argument disposed of by the decision in *Electric Bond and Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419

(1938), *supra*, but it has uniformly been held that the Federal Government cannot use one of its enumerated powers to regulate matters not within its power. It cannot be pretended that Section 11(b)(1) regulates the use of the mails or such instrumentalities of interstate commerce.

As this Court said in *Electric Bond and Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419 (1938), *supra* (p. 442):

> "* * * Congress may not exercise its control over the mails to enforce a requirement which lies outside its constitutional province * * *."

Mr. Justice Holmes said in *The Pipe Line Cases*, 234 U. S. 548, 560-61 (1914):

> "The control of Congress over commerce among the States cannot be made a means of exercising powers not entrusted to it by the Constitution, * * *."

This principle was announced early. Chief Justice Marshall, in *McCulloch* v. *Maryland*, 4 Wheaton 316 (1819), said (p. 422):

> "should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land."

The principle has been most frequently applied in declaring invalid tax statutes passed by the Federal Government to regulate local matters not within its power.*

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* *Hill* v. *Wallace*, 259 U. S. 44 (1922) (Tax on transactions not on a regulated grain exchange.)
Linder v. *U. S.*, 268 U. S. 5 (1925) (Invalid regulation of doctor's prescription for ostensible enforcement of Narcotic Tax Law—validity of tax not questioned.)

The principle is applicable to the powers exercised by the states.

> *Frost & Frost Trucking Co.* v. *Railroad Commission of California*, 271 U. S. 583 (1926);
> *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105 (1918);

In the latter case, Mr. Justice Holmes said (p. 114):

> "* * *, and a constitutional power cannot be used by way of condition to attain an unconstitutional result."

In concluding this Point, we call to the attention of the Court that not only has Congress made no finding, nor required the S. E. C. to find, that companies to which Section 11(b)(1) is applied are in, or affect, interstate commerce, but, in addition, Congress has not found, nor required the S. E. C. to find, nor has the S. E. C. found, that the action the S. E. C. has ordered taken will have any effect on interstate commerce, beneficial or otherwise, or is appro-

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U. S. v. *Constantine*, 296 U. S. 287 (1935) (Liquor license tax which was higher for dealers violating state law than for those complying therewith.)
U. S. v. *Butler*, 297 U. S. 1 (1936) (Processing tax linked to regulation of agriculture. Here the tax was not used as a penalty.)
Carter v. *Carter Coal Company*, 298 U. S. 238 (1936) (Heavy tax on sales from which exemption could be obtained by complying with regulations.)

The dissenting Justices in some of these cases simply disagreed that the statute was an attempted regulation rather than a true exercise of the taxing power, but fully recognized the principle. For example, Mr. Justice Stone, dissenting in *U. S.* v. *Butler*, 297 U. S. 1 (1936), *supra*, at page 87 said:

> "The power to tax and spend is not without constitutional restraints. One restriction is that the purpose must be truly national. Another is that it may not be used to coerce action left to state control."

priate in the light of any effect it may have on interstate commerce. No one has found that the divestments ordered pursuant to Section 11(b)(1) have any "substantial economic effect" on interstate commerce. (*Cf.* statement in *Wickard v. Filburn*, 317 U. S. 111 (1942) by Mr. Justice Jackson, at p. 125, on the point that at least a "substantial economic effect" on interstate commerce must be shown before there is Congressional power to take action.)

If Section 11(b)(1) could be held to rest on a federal power, there would be no limit to the subject matter of federal power and nothing would be outside the scope of federal power, except matters of domestic relations or the like. There is no suggestion that there is any federal power to regulate public utilities as such and there is nothing about the public utility field which would lead to a conclusion that federal power could apply only to corporations in that field and not to corporations in all other fields of industry. Consequently, if Section 11(b)(1) could be upheld as within the federal power, this power would extend over all types of industry, and an analogue to Section 11(b)(1) could be so applied. A federal commission for all industry, or federal commissions for separate industries, could reshape the corporations and groups of corporations therein, and decree (as under Section 11(b)(1)) that they have too many plants or other assets and must give up most of them, or (as under Section 11(b)(2)) that their structure is "unduly or unnecessarily complicated" or the distribution of voting power therein is "unfair or inequitable", and, if the construction which has been placed on Section 11(b)(2) by the S. E. C. is correct, dissolve them.

II. The constitutional limitations on federal power imposed by the due process clause of the Fifth Amendment are violated by Section 11(b)(1).

1. The subsection violates the due process clause by taking property for public use without a condemnation proceeding and just compensation.

Section 11(b)(1) authorizes the S. E. C. to require corporations to divest themselves of their assets, except for those falling in the strictly limited class which may be retained. This necessarily involves a taking of property which is prohibited by the Fifth Amendment so far as the Federal Government is concerned, and by the Fourteenth Amendment so far as the state governments are concerned. Certainly there is great value inherent in the assemblage of properties constituting the assets of North American (over and above the separate value of each item of its property) which will be lost through the divestment order.

The compulsion to sell properties pursuant to a divestment order also constitutes the taking of valuable property. Moreover, not only is the holder of such property a forced seller, but it has not the opportunity of choosing its own time for making sales of particular assets, that is, when circumstances are favorable for sales of those particular assets as the local situation affecting them develops. These disadvantages and the inevitable taking of property result from forced liquidation at any time but they are accentuated to a devastating degree in time of war. In such a period, there are no markets in which a reasonable price can be obtained for assets of any substantial size, and there are poor markets even for assets of small size.

In addition, a divestment order deprives investors in North American of the advantages which they purchased, including diversification of their investment and supervision by an efficient management of North American's investments in operating companies. Moreover, the corporations involved and the investors therein will be deprived, by the carrying out of the divestment order, of the benefit resulting from the consolidation provisions of the federal income tax laws.

All of these items of property are, under Section 11(b)(1), to be taken from corporations and persons who are not even claimed to have violated any law, merely because Congress has decided that the theoretically ideal structure in the public utility field is an integrated public holding company system of comparatively small size and that it is for the general public good that larger systems be dismembered notwithstanding the grave loss which this will inflict upon those systems and the investors in them.

Thus, this property is being taken under Section 11(b)(1) for the purpose of creating theoretically ideal structures in the public utility field which is deemed to benefit the public generally. As was held in a recent decision of this Court, the taking of this sort of private property for this sort of public purpose requires a condemnation proceeding, involving just compensation, in order to accord with the due process clause of the Fifth Amendment. *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555 (1935).

Section 11(b)(1) from the standpoint of the due process clause is very similar to the first Frazier-Lemke Act, adopted as part of the Bankruptcy Act, which was held invalid in the *Radford* case. Under that Act, farmers' assets and financial obligations were to be reorganized,

with the view that it was in the public interest to leave farmers in possession, and also preferably in ownership, of their lands, and not to have them foreclosed out through inability to meet mortgage obligations.

To this end, the Frazier-Lemke Act provided that a farmer in default on his mortgage could have resort to a court of bankruptcy, which would permit him to remain in possession of his lands. Then the farmer was to purchase the property at its appraised value, through deferred payments over a six-year period, if the mortgagee consented. If the consent were not forthcoming, foreclosure proceedings were stayed for five years, and the farmer remained in possession, paying a "reasonable rental" annually. At the end of five years, or at any time prior thereto, the farmer might pay into Court the appraised value of the property in full discharge of the debt.

That Act applied to vested property rights, that is, to mortgages already existing at the time of the enactment of the Act. In the *Radford* case, this Court held that Act unconstitutional on the ground that it took substantive property rights, which had already vested, from mortgagees and transferred them to the farmer. The Court said that while this might well be in the public interest, it was not due process under the Fifth Amendment to do so without having a condemnation proceeding and paying just compensation to the mortgagee. In other words, the shifting of the property rights from the mortgagee to the farmer was a quasi-public taking, for a public economic or social purpose, and it was not due process to do so without a condemnation proceeding involving payment of compensation.

The public interest had been argued to the Court at length.* The Court said (Mr. Justice Brandeis), (p. 601):

> "We have no occasion to consider either the causes or the extent of farm tenancy; or whether its progressive increase would be arrested by the provisions of the Act. Nor need we consider the occupations of the beneficiaries of the legislation. These are matters for the consideration of Congress; and the extensive provision for the refinancing of farm mortgages which Congress has already made, shows that the gravity of the situation has been appreciated. The province of the Court is limited to deciding whether the Frazier-Lemke Act as applied has taken from the Bank without compensation, and given to Radford, rights in specific property which are of substantial value. * * * As we conclude that the Act as applied has done so, we must hold it void. For the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits,

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* The Court (Mr. Justice Brandeis) itself states that argument as follows (p. 598):

> "(1) The welfare of the Nation demands that our farms be individually owned by those who operate them. (2) To permit widespread foreclosure of farm mortgages would result in transferring ownership, in large measure, to great corporations; would transform farmer-owners into tenants or farm laborers; and would tend to create a peasant class. (3) There was grave danger at the time of the passage of the Act, that foreclosure of farms would become widespread. The persistent decline in the prices of agricultural products, as compared with the prices of articles which farmers are obliged to purchase, had been accentuated by the long continued depression and had made it impossible for farmers to pay the charges accruing under existing mortgages. (4) Thus had arisen an emergency requiring congressional action. To avert the threatened calamity the Act presented an appropriate remedy. Extensive economic data, of which in large part we may take judicial notice, were submitted in support of these propositions."

> the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."

To the same effect as the *Radford* case is

> *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312 (1893).

Also to the same effect is *Lord* v. *Equitable Life Assurance Society*, 194 N. Y. 212 (1909) in which the New York Court of Appeals, after referring to the fact that the state in that case had even reserved the right to amend the charter of the corporation involved, said (p. 227):

> "The right to amend a charter, however, does not include the right to take away money invested in reliance thereon, or property acquired thereunder. The power of amendment reserved by the Constitution or statutes of a state does not permit interference with property or property rights, because they are protected by the Constitution of the United States. When the legislature has created a corporation and has given it power to acquire property, it cannot take away the property so acquired without providing for compensation. (*Mayor, etc., of N. Y.* v. *Twenty-third St. Ry. Co.*, 113 N. Y. 311, 317.)"

The present case is strikingly parallel to the *Radford* case. Section 11(b)(1) is a statute involving the destruction of valuable property rights. It is allegedly founded on a public interest in the structure of public utility holding company systems, or of the corporations making up the systems. The Act recites the national public interest, the interest of consumers, and the interest of

investors, and even the interests of the states. It proceeds, as did the Act involved in the *Radford* case, without a condemnation proceeding, and also, as pointed out hereinafter in this Point, without the minimum safeguards necessary for a reorganization statute, and does not even purport to be a bankruptcy statute but operates on solvent corporations.

Are there any points of difference, so far as concerns the application of the Fifth Amendment, between the present case and the *Radford* case which would impel a court to depart from the holding in the *Radford* case? On the contrary, if there are any differences, they call for the application of the due process clause in this case more strongly than in the *Radford* case. Insolvency is not required to be present (as it was in the case of the Frazier-Lemke Act) for the S. E. C. to proceed under Section 11(b)(1), and there are not present the safeguards provided in the Frazier-Lemke Act and also in the other supplements to the Bankruptcy Act.

It is not a distinction, as pointed out in Point II(4) below, which obviates the application of the due process clause that, in the present situation, it is charged, or found, by Congress, or the S. E. C., or both, that prior to the enactment of the Act, public utility holding companies erected their systems by financing arrangements and methods now condemned by Congress, or the S. E. C., but not, at the time, in violation of law. The point is, that the property rights legally existed in the systems at the time of the enactment of the Act. This, in itself, brings into play the requirements of due process. As this Court said in the *Radford* case (p. 589):

> "Because the Act is retroactive in terms and as here applied purports to take away rights of the mort-

gagee in specific property, another provision of the Constitution is controlling.

"*Fourth.* The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment."

The Court below held in the present case that the divestment required under Section 11(b)(1) was not a violation of the due process clause as a taking of property for public use without payment of just compensation. The Court said (133 F. (2d), at p. 154):

"Under section 11(c) the petitioner is given a year within which to comply with the order and may on proper showing obtain an additional period not exceeding one year. If divestment can be effected by distribution in kind, there may be no loss in values. If, as petitioner contends, such distribution will be impossible and a liquidation by sale becomes necessary, the process may be painful to its common stockholders, but we cannot say that the remedy selected by Congress is so unreasonable, arbitrary or capricious as to constitute taking property without due process."

This reasoning of the Court below can hardly be persuasive. The Court said there *might* be no loss in values if divestment could be effected by distribution in kind. But distribution in kind would only serve to avoid losses due to inability to obtain a fair market value for the assets to be divested. There would nevertheless remain great losses such as are mentioned at the beginning of this Point, including the value inherent in the assemblage of North American's securities and in the diversification afforded to the investors in North American's securities and the income tax savings effected by consolidated income tax re-

turns. Furthermore, with debentures and preferred stock outstanding aggregating over $100,000,000 at their liquidation or redemption prices, it is plain that a large amount of liquidation of securities will in any event be necessary in carrying out the divestment order even if some assets can be distributed in kind. But the greatest difficulty with the above-quoted portion of the opinion of the Court below is the statement, in effect, that although a taking of North American's property as a result of the divestment order might "be painful to its common stockholders", the divestment was not "capricious" and, therefore, did not constitute a taking of property without due process. How capriciousness can be the test of whether property may be taken for a public use without condemnation and compensation is difficult to see. The ordinary taking for a public use is deliberate and the opposite of capricious. When property is taken for a public highway, this is not capriciously done, but property directly in the planned right of way is selected. Does the fact that such taking is deliberate and appropriate and not capricious mean that the property does not have to be paid for?

Nor is the type of property of which North American is required to divest itself, *i. e.*, securities, entitled to less protection through the due process clause than tangible property, such as land. In the *Radford* case, this Court held that impairment of the substantive rights of a mortgagee, purely intangible rights, even if done in the public interest in order to keep farmers on their farms, was contrary to the due process clause for failure to have a condemnation proceeding, including payment of just compensation. Surely, the decision and reasoning of this Court in the *Radford* case will be deemed controlling here and not the erroneous reasoning of the Court below in the present case. Also in

Monongahela Navigation Co. v. *U. S.*, 148 U. S. 312 (1893) *supra*, this Court held that intangible property (a franchise to collect tolls) was protected by the due process clause from being taken without condemnation and payment of just compensation.

2. The subsection violates the due process clause by subjecting solvent corporations to compulsory involuntary reorganization or liquidation.

The S. E. C. contends that under Section 11(b)(1) and under Section 11(d), the provision for enforcement of Section 11, any state corporation can be reorganized or liquidated by the Federal Government, whether it is solvent or insolvent.

This is contrary to first principles. Compulsory involuntary reorganization can only take place through the exercise of the bankruptcy power,* and the exercise of the bankruptcy power is dependent on the *insolvency*, in either the bankruptcy or equity sense, of the subject.

> *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648 (1935);
>
> *Wright* v. *Union Central Life Insurance Co.*, 304 U. S. 502 (1938).

In the *Continental Illinois* case this Court said as to the bankruptcy power (p. 670):

> "Judge Cowen, in *Kunzler* v. *Kohaus*, 5 Hill 317, 321, a decision which was approved by this court in

* So-called reorganizations in equity are simply foreclosures under the exercise of a mortgagee's contractual power to compel the sale of the mortgaged assets or are in the nature of execution sales to satisfy creditors' claims. The creditor then takes his share of the price or has the option of taking securities in a new corporation, which acquires the assets of the old. Even this type of reorganization is not effected unless the debtor company is in financial distress.

> *Hanover National Bank* v. *Moyses*, [180 U. S. 181] *supra*, said that the power was the same as though Congress had been authorized 'to establish uniform laws on the subject of any person's general inability to pay his debts * * *'".

In the *Wright* case this Court said (p. 513):

> "The subject of bankruptcies is nothing less than 'the subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief.' This definition of Judge Blatchford, afterwards a member of this Court, has been cited with approval here."

Take the situation of North American itself. There is no finding, and there could be none, that it is insolvent in any sense. There has never been a default on any security of North American. On any basis of valuation, it cannot be disputed that there is a real and substantial equity for its common stock. In the *Radford* case, *supra*, where the statute for reorganization of farmers' finances was held invalid, at least there was present a factor permitting exercise of the bankruptcy power, which is missing here. Radford was insolvent and unable to pay his creditors. Nevertheless, the taking of substantive rights of his creditors under that statute was held unconstitutional. The reorganization statute involved here is outlawed for the reasons condemning the statute in the *Radford* case and also for the further reason that it is made applicable to solvent corporations.

3. The subsection violates the due process clause because it does not contain the minimum safeguards required even for an exercise of the bankruptcy power.

Section 11(b)(1) and Section 11(d), which provides for enforcement of orders issued under Section 11(b)(1), lack

at least two minimum safeguards which every bankruptcy act applicable to insolvent debtors must contain in order to comply with the due process clause. If a bankruptcy reorganization act would be invalid without these two safeguards, as in violation of the due process clause, certainly a reorganization act which is applicable to solvent corporations which are not subject to the bankruptcy power must be invalid if such safeguards are missing. The missing safeguards are:

(1) Provisions requiring a hearing before the Court, for security holders of the companies to be reorganized.

There is no provision whatever in the Act that security holders shall have a hearing before the Federal Court on any issue regarding divestment of assets under Section 11(b)(1) or any order relating thereto or the reorganization made necessary by the divestment of assets. Nor is there even any provision in the Act giving security holders a right to any hearing before the S. E. C.*

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* There is a provision that the S. E. C. *may* grant security holders a hearing. This word "may" in the Act (Section 19) cannot be construed as mandatory because in the same sentence it is provided that the S. E. C. *shall admit as a party* any interested state, state commission or political subdivision of a state. As this Court held in *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 424-5 (1915) as to the absence of a statutory requirement of a hearing for stockholders:

> "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. * * * 'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court."

Similarly, it has been held by this Court that actual notice given as a matter of discretion does not meet the due process requirement that reasonable notice be mandatory under the statute. *Wuchter* v. *Pizzutti*, 276 U. S. 13 (1928).

(2) Provision for vote or consent of security holders affected.

There is no provision whatever in the Act for any vote or consent of security holders in respect of any reorganization to be effected under Section 11(b)(1) and Section 11(d). In *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555 (1935), *supra*, this Court held that, under a reorganization statute for farmers, the substantive rights of the farmer's mortgagee could not be adversely affected without the mortgagee's consent, unless the mortgagee belonged to a class, the majority of which voted for, or consented to, the change in rights, and unless the change was approved by the Court. These are two of the minimum safeguards required for any compulsory reorganization. On this point this Court said (Mr. Justice Brandeis) at pages 585-6:

> "Nor do the provisions of the bankruptcy acts concerning compositions afford any analogy to the provisions of Paragraph 7. So far as concerns the debtor, the composition is an agreement with the creditors in lieu of a distribution of the property in bankruptcy—an agreement which 'originates in a voluntary offer by the bankrupt, and results in the main, from voluntary acceptance by his creditors.' * * * In no case of composition is a secured claim affected except when the holder is a member of a class; and then only when the composition is desired by the requisite majority and is approved by the court."

To the same effect with respect to railroad bankruptcy reorganizations is *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648 (1935), *supra* (pp. 673, 675).

There is something startling about the conception that North American's assets can be ordered to be divested and

the rights of its security holders can be changed, *i. e.*, reorganized or liquidated, by the simple fiat of a federal commission when no insolvency is involved and none of the safeguards employed in the bankruptcy process are used. Why has this not been done in the railroad field? A large number of the railroad systems of the country are insolvent and have been in reorganization proceedings for eight to ten years. With Congress, the Courts and the Interstate Commerce Commission exercising all their ingenuity to expedite and simplify the reorganization process, this simple procedure, ignoring private rights, has not been applied to the railroads. If the procedure is valid here, it is valid not only for insolvent railroads but for railroads which are solvent. All power under the commerce clause may be used in the case of solvent or insolvent railroads; the major railroad systems are beyond question fully in interstate commerce. Insolvent railroads are also a proper subject for the exercise of the bankruptcy power. Yet no one has thought that the fundamental rights of the railroads and their security holders can be taken by any such procedure as that set out in Section 11. It would obviously be a violation of the due process clause.

4. If Section 11(b)(1) is sought to be sustained on the basis of alleged abuses (which were not violations of law) occurring prior to its enactment, the Section violates the due process clause as in effect the enforcement of an *ex post facto* law.

Section 1 of the Act recites alleged abuses by public utility holding companies which occurred prior to the enactment of the Act and which were not in violation of any law existing at the time the alleged abuses occurred. The S. E. C. in the Court below tried to use these recitals as a basis of support for Section 11(b)(1), for it submitted,

as an appendix to its brief, a so-called "Economic Supplement" which contained reference to instances of such abuses relating to public utility holding companies. Moreover the S. E. C. tried to draw some analogy between Section 11(b)(1) and the Sherman Anti-Trust Act.

While such alleged abuses may form a basis for *regulation* of *future activities* of public utility holding companies, so far as such activities affect interstate commerce, they can form no basis for Section 11(b)(1), which is not regulatory but which takes existing property rights legally acquired.

If abuses occurring prior to the enactment of the Act and not violating any then existing law are the basis for the taking of property through Section 11(b)(1), the Section imposes a penalty for past acts which did not violate any law at the time committed, and the Section violates the due process clause as in effect the enforcement of an unconstitutional *ex post facto* law. A law need not be *in form* a criminal law to violate the prohibition.

> *Fletcher* v. *Peck*, 6 Cranch, 87 (1810) (annulling title to real property);
>
> *Cummings* v. *The State of Missouri*, 4 Wall. 277 (1866) (denial of right to hold office and practice profession);
>
> *Ex parte Garland*, 4 Wall. 333 (1866) (denial of right to practice profession);
>
> *Pierce* v. *Carskadon*, 16 Wall. 234 (1872) (denial of right to defend legal proceedings).

Just as the taking of property without just compensation is a violation of the due process clause (as was held by this Court in the *Radford* case), so also the taking of property as a penalty under a law which is in effect an *ex post facto* law is a violation of the due process clause.

Nor is there any analogy here to the cases under the anti-trust laws as claimed by the S. E. C. In such cases corporations are required to divest themselves of their properties, but the ground for the divestment is that the properties had been put together and combined in violation of the anti-trust laws existing at the time the combinations were put together. There is no charge here that North American acquired any of its properties in violation of any law or statutory prohibition existing at the time of the acquisitions. Consequently, no support can be drawn by the S. E. C. from the cases under the anti-trust laws.

Conclusion.

Section 11(b)(1) should be held by this Court to be unconstitutional in that it does not rest on any federal power but has a scope beyond any federal power, and in that it is a violation of the due process clause of the Fifth Amendment.

Respectfully submitted,

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March 30, 1943.

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SUPREME COURT OF THE UNITED STATES.

No. 1.—October Term, 1945.

The North American Company, Petitioner, *vs.* Securities and Exchange Commission.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 1, 1946.]

Mr. Justice Murphy delivered the opinion of the Court.

Congress enacted the Public Utility Holding Company Act of 1935, 49 Stat. 803, in order to correct grave abuses which it had found in the use of the holding company device in the nation's electric and gas utility industries. This Court in *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, held constitutional the various provisions of the Act relating to the registration of holding companies as therein defined. In this case we are called upon to determine the constitutionality of § 11(b)(1) of the Act, authorizing the Securities and Exchange Commission to act to bring about the geographic and economic integration of holding company systems. Specifically, we must decide whether this requirement falls within the power of Congress to regulate commerce among the several states and whether it violates the due process clause of the Fifth Amendment.

The North American Company, the petitioner, is a holding company within the meaning of the Act, § 2(a)(7), and is registered as such with the Securities and Exchange Commission.[1] The Commission instituted appropriate administrative proceedings against North American under § 11(b)(1), the provisions of which apply to registered holding companies. As a result, the Commission entered orders limiting North American's properties to those which, in the Commission's judgment, complied with the standards of § 11(b)(1) and compelling it to sever relationships with all its other properties.[2] The court below, after affirming the orders of the Commission on a statutory level, rejected North

[1] North American registered with the Commission on February 25, 1937, reserving its right to challenge the constitutionality of § 11(b)(1) and other portions of the Act. See Landis v. The North American Company, 299 U. S. 248, 251-252; Electric Bond & Share Co. v. Securities and Exchange Commission, 303 U. S. 419, 435.

[2] Holding Company Act Releases Nos. 3405 and 3629.

American's constitutional objections. 133 F. 2d 148. Only these constitutional issues are now before us.

As was the situation in the *Electric Bond & Share Co.* case, North American is clearly engaged in activities which bring it within the ambit of congressional authority. North American is a typical utility holding company. It is the pinnacle of a great pyramid of corporations, the majority of which operate electric and gas utility properties. These properties are scattered throughout the United States, many of them serving large cities and contiguous territories.[3] Electric energy is transmitted across state lines by numerous companies in the pyramid or system.[4] As of December 31, 1940, there were some eighty corporations in the system, with an aggregate capitalized value in excess of $2,300,000,000. Organized in New Jersey in 1890 and maintaining business headquarters in New York City, North American maintains direct or indirect interests in these corporations through the medium of stock ownership. It is that medium that binds the system together.

North American owns stock directly in ten of the corporations, holding 79% or more of the common stock of eight of them and 17.71% and 19.2%, respectively, of the voting securities of the other two. Three of these direct subsidiaries are registered holding companies: (1) Union Electric Company of Missouri, operating in and around St. Louis, Mo., and with subsidiaries operating in Illinois and Iowa as well; (2) Washington Railway and Electric Company, with subsidiaries operating in the District of Columbia and adjacent territory in Virginia and Maryland; and (3) North American Light & Power Company, operating extensive systems in Kansas, Missouri, Illinois and Iowa in addition to being the parent of several registered holding companies.

Four of the direct subsidiaries of North American are operating companies: (1) Cleveland Electric Illuminating Company, serving Cleveland, Ohio, and surrounding territory; (2) Pacific Gas & Electric Company, serving large areas in California; (3) The Detroit Edison Company, serving Detroit and vicinity; and (4) Wisconsin Electric Power Company, a holding company with subsidiaries operating an integrated electric utility system in Wisconsin and Michigan.

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[3] Federal Trade Commission Report to the Senate, "Utility Corporations," Sen. Doc. 92, Part 72-A, 70th Cong., 1st Sess., pp. 107-110, 706-716.

[4] In 1929 and 1930, companies in the North American system transmitted 9.3% and 7.7%, respectively, of the total amount of electric energy transmitted across state boundaries in the United States. Federal Trade Commission Report, *supra*, note 3, p. 43, Table 13.

The other three direct subsidiaries are (1) North American Utility Securities Corporation, an investment trust; (2) West Kentucky Coal Company, which owns and operates a coal mine in Kentucky and sells coal in interstate commerce; and (3) 60 Broadway Building Corporation, which owns the office building in New York City where petitioner has its offices.

The various companies in the North American system perform a variety of functions from electric and gas service to railroad transportation, warehousing and amusement park operations. All told, they conduct business in seventeen states and the District of Columbia. Electric service alone is provided for more than 3,000,000 customers in an area of roughly 165,000 square miles.

North American claims that its sole and continuous business has been that of acquiring and holding for investment purposes stocks and other securities of the subsidiaries, its relationship being essentially that of "a large investor seeking to promote the sound development of his investment." Active intervention on North American's part in the activities of these companies, it is true, has been of a limited character. Operations and operational policies, the Commission found, have been left entirely to the local managements. Nor has North American sold these subsidiaries any supplies or engineering service. [redacted]s lack of active intervention, however, is indecisive. It appears to have resulted in large part from North American's satisfaction with the local managements of the subsidiaries and from the fact that the local managements have often included men selected by or historically related to North American. See *Detroit Edison Co.* v. *Securities and Exchange Commission*, 119 F. 2d 730, 734-735; *Pacific Gas & Electric Co.* v. *Securities and Exchange Commission*, 127 F. 2d 378, 383-384. The Commission was thus warranted in considering the harmonization of local policies with those of North American as a fact, the absence of conflicts making affirmative action by North American unnecessary. But it does not follow that North American's domination of its system was any less real or effective. Historical ties and associations, combined with strategic holdings of stock, can on occasion serve as a potent substitute for the more obvious modes of control. See *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, 491-492; *Natural Gas Co.* v. *Slattery*, 302 U. S. 300, 307-308. Domination may spring as readily from subtle or unexercised power as from arbitrary imposition of command. To conclude otherwise is to ignore the realities of intercorporate relationships. *Rochester Telephone*

Corp. v. *United States*, 307 U. S. 125, 145-146. In light of the extensiveness of North American's holdings of the securities of its subsidiaries and the penetration of local managements with men of North American background, the Commission was justified in treating North American as possessing domination over its subsidiaries or the power to dominate them when and if necessary.[5]

But North American in some respects has actually intervened in the activities of its subsidiaries. It has affirmatively participated in and dominated their financing operations.[6] So completely has it taken over the planning and handling of the various flotations of securities that North American urged before the Commission, though in vain, that the subsidiaries were incompetent to handle such matters and that it would be highly uneconomical for them to attempt to do so. As the Commission noted, the ability to dominate this financing and to control the flow, through underwriting channels, of millions of dollars of securities has been of great value and benefit to North American, in addition to being of aid to the subsidiaries. North American has also provided the subsidiaries with advisory and consultative facilities in relation to management problems; and intercompany committees have been created to serve as clearing houses for technical and accounting information.

The interstate character of North American and its subsidiaries is readily apparent from the Commission's survey of their activities. North American is more than a mere investor in its subsidiaries. See *Northern Securities Co.* v. *United States*, 193 U. S. 197, 353-354. It is the nucleus of a far-flung empire of corporations extending from New York to California and covering seventeen states and the District of Columbia. Its influence and domination permeate the entire system and frequently evidence themselves in affirmative ways. The mails and the instrumentalities of interstate commerce are vital to the functioning of this system. They have more than a casual or incidental relationship. Cf. *Ware & Leland* v. *Mobile County*, 209 U. S. 405; *Blumenstock Bros.* v. *Curtis Pub. Co.*, 252 U. S. 436; *Federal Baseball Club* v. *National*

[5] As to only two of the subsidiaries, the Detroit Edison Company and the Pacific Gas & Electric Company, has a claim been raised that they were not controlled by or subject to a controlling influence of North American. The Commission rejected both claims after hearings and its determinations were sustained upon appeal. Detroit Edison Co. v. Securities and Exchange Commission, 119 F. 2d 730, cert. denied, 314 U. S. 618; Pacific Gas & Electric Co. v. Securities and Exchange Commission, 127 F. 2d 378, affirmed on rehearing by equally divided court, 139 F. 2d 298, affirmed by equally divided Court, 324 U. S. 826.

[6] See Federal Trade Commission Report, *supra*, note 3, p. 347.

League, 259 U. S. 200. Without them, North American would be unable to float the various security issues of its own or of its subsidiaries, thereby selling securities to residents of every state in the nation. Without them, North American would be unable to exercise and maintain the influence arising from its large stock holdings, receiving notices and reports, sending proxies to stockholders' meetings, collecting dividends and interest, and transmitting whatever instructions and advice may be necessary. Nor could North American maintain its other relationships and contacts with its own subsidiaries without the use of the mails and facilities of interstate commerce. Such interstate commercial transactions involve the very essence of North American's business. See *International Textbook Co.* v. *Pigg*, 217 U. S. 91. They enable it "to promote the sound development" of its investments from its headquarters in New York City. In short, they are commerce which concerns more states than one. *Gibbons* v. *Ogden*, 9 Wheat 1, 194; *Second Employers' Liability Cases*, 223 U. S. 1, 46; *The Minnesota Rate Cases*, 230 U. S. 352, 398. As stated by this Court in *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 128, "Interstate communication of a business nature, whatever the means of such communication, is interstate commerce regulable by Congress under the Constitution."

Moreover, North American concedes that four of its direct utility subsidiaries, Union Electric Company of Missouri, Washington Railway and Electric Company, North American Light & Power Company and Wisconsin Electric Power Company, transmit energy across state lines and hence are engaged in interstate commerce. It further concedes that its subsidiary West Kentucky Coal Company is engaged in interstate commerce, although contending that the remaining five direct subsidiaries are not so engaged. In view of North American's very substantial stock interest and its domination as to the affairs of its subsidiaries, as well as its latent power to exercise even more affirmative influence, it cannot hide behind the facade of a mere investor. Their acts are its acts in the sense that what is interstate as to them is interstate as to North American. These subsidiaries thus accentuate and add materially to the interstate character of North American. *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, *supra*, 440. They make even more inescapable the conclusion that North American bears not only a "highly important relation to interstate commerce and the national economy," *Id.*, p. 441, but is actually engaged in interstate commerce. It is thus subject to

appropriate regulatory measures adopted by Congress under its commerce power.

Turning to § 11(b)(1)[7] and its constitutional impact upon North American, we find that it directs the Commission to apply its provisions to holding companies engaged in interstate commerce. In essence, it confines the operations of each holding company system to a single integrated public utility system with provision for the retention of additional systems only if they are relatively small, located close to the single system and unable to operate economically under separate management without the loss of substantial economies; in addition, other holdings may be retained only if their retention is related to the operations of the retained utility properties.

These requirements of § 11(b)(1) apply only to registered holding companies. A holding company, by statutory definition, is a company that controls or possesses a controlling influence over an electric or gas utility company. § 2(a)(7). A holding of 10% or more of the outstanding voting securities of such a utility company is presumed to be sufficient to constitute such a relationship, but this presumption may be rebutted by proof before the Commission of a lack of control or controlling influence.

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[7] "Sec. 11(a) . . .

"(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

"(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding company system of which such company is a part to a single integrated public utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public utility system: *Provided, however,* That the Commission shall permit a registered holding company to continue to control one or more additional integrated public utility systems, if, after notice and opportunity for hearing, it finds that—

"(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

"(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign territory; and

"(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public utility systems the retention of an interest in any business (other than the business of a public utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems."

Accordingly, a company that is a mere investor in utility securities and that does not control or possess a controlling influence over the utility companies need not comply with § 11(b)(1).

A holding company as so defined must register and hence must obey the commands of § 11(b)(1) if it uses the mails or the instrumentalities of interstate commerce directly or through its subsidiaries in the operation of its business.[8] Thus a holding company may sell, transport or distribute gas or electric energy in interstate commerce. § 4(a)(1). It may use the mails or interstate commerce to negotiate or perform service, sales or construction contracts with other companies in the system. § 4(a)(2). It may use the mails or interstate commerce to distribute or make public offerings for the sale or exchange of securities of its own or of other system companies. § 4(a)(3). It may use the mails or interstate commerce to acquire securities or utility assets of other companies. § 4(a)(4). It may engage in a business in interstate commerce. § 4(a)(5). Or it may own or control securities of subsidiaries that do any of the foregoing acts. § 4(a)(6). Moreover, § 2(a)(28) defines "interstate commerce," as used in these and other provisions of the Act, to mean "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof."

By making these enumerated interstate transactions unlawful unless the holding company registers with the Commission and by extending § 11(b)(1) to registered holding companies, Congress has effectively applied § 11(b)(1) to those holding companies that are in fact in the stream of interstate activity and that affect commerce in more states than one. Congress has further declared in § 1(c) that all the provisions of the Act, thus including § 11(b)(1), shall be interpreted to meet the problems and remove the evils connected with public utility holding companies "which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce." Section 11(b)(1) is thus clearly and unmistakably applicable to holding companies engaged in interstate commerce.

Not all holding companies that are engaged in interstate activities, however, must necessarily comply with § 11(b)(1). By the

[8] Section 4(b) compels holding companies to register if they have outstanding any security which has been distributed by the use of the mails or commerce, or offered for sale by like means, subsequent to January 1, 1925, and if that security is held on October 1, 1935, by any person not a resident of the state in which the holding company is organized. We need not here consider the force of this section, however, since North American and other interstate holding companies are forced to register by reason of the provisions of § 4(a).

terms of § 3(a)(1), if a holding company and all of its subsidiaries are predominantly intrastate in character and carry on their business substantially in a single state in which such holding company and every subsidiary thereof are organized, the Commission may grant an exemption from any provision of the Act "unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers."

The power of the Commission under the "unless and except" clause of § 3(a) to deny an exemption to a predominantly local holding company does not mean, as North American urges, that a holding company having no relation whatever to interstate commerce be subjected to § 11(b)(1) or to any other provision of the Act. The Commission, in denying an exemption under this clause, is bound by the policy set forth in § 1(c) to act so as to eliminate evils connected with holding companies "engaged in interstate commerce or in activities which directly affect or burden interstate commerce." A holding company predominantly local in character may nevertheless engage in activities affecting or burdening interstate commerce to the detriment of the public interest or the interests of investors and consumers. Only in such a case could the Commission properly deny an exemption under the "unless and except" clause.[9] This problem, however, is academic so far as North American is concerned. Like most public utility holding companies, North American is engaged in interstate commerce directly and through its subsidiaries. It can lay no claim to a predominantly intrastate character; as to it, § 3(a)(1) is wholly inapplicable. The possibility that the Commission might erroneously fail to exempt some truly local holding company from the provisions of § 11(b)(1) cannot negative the plain fact that § 11(b)(1) was designed to apply and does apply to holding companies engaged in interstate commerce. North American is therefore subject to its terms.

The crucial constitutional issue, so far as the commerce clause is concerned, resolves itself into the query whether Congress may validly require holding companies engaged in interstate commerce to dispose of their security holdings and to confine their activities in accordance with the standards of § 11(b)(1). In urging the negative answer to this query, North American relies upon the settled doctrine that the federal commerce power extends to intra-

[9] The Commission has recognized the fact that the declaration of policy in § 1(c) must be considered in granting or denying exemptions under § 3(a) to predominantly intrastate holding companies. See In re Niagara Hudson Power Corporation, Holding Company Act Release No. 5115; In re Long Island Lighting Company, Holding Company Act Release No. 5746.

state activities only where those activities "so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 119. See also *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453, 466; *United States* v. *Darby*, 312 U. S. 100, 118-123; *Wickard* v. *Filburn*, 317 U. S. 111, 122-124. It is said that the ownership by North American of securities of other system companies is not in itself commerce, interstate or intrastate, and that the right to own or retain property is characteristically governed by state laws, the federal government having no concern with such matters except as an incident to the due exercise of one of its granted powers. North American denies that the necessary relationship between the ownership of securities and interstate commerce is self-evident or that it has been found as a fact by Congress, the Commission or any court. The absence of this relationship, it is concluded, causes § 11(b)(1) to fall.

This argument, however, misconceives not only the power of Congress over interstate commerce but also the basic nature of public utility holding companies and the effect that stock ownership has upon their activities. The dominant characteristic of a holding company is the ownership of securities by which it is possible to control or substantially to influence the policies and management of one or more operating companies in a particular field of enterprise.[10] To be sure, other devices may be utilized to effectuate control, such as voting trusts, interlocking directors and officers, the control of proxies, management contracts and the like. But the concentrated ownership of voting securities is the prime method of achieving control, constituting a more fundamental part of holding companies than of other types of business. Public utility holding companies are thereby able to build their gas and electric utility systems, often gerrymandered in such ways as to bear no relation to economy of operation or to effective regulation. The control arising from this ownership of securities also allows such holding companies to exact unreasonable fees, commissions and other charges from their subsidiaries, to make undue profits from the handling of the issue, sale and exchange of securities for

[10] Bonbright and Means, The Holding Company (1932), p. 10; Jones and Bigham, Principles of Public Utilities (1931), p. 589; Hearings before House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., on H. R. 5423, Part 1, pp. 76-77.

their subsidiaries, to issue unsound securities of their own based upon the inflated value of the subsidiaries, and to effect adversely the accounting practices and the rate and dividend policies of the subsidiaries. See § 1(b).[11] Congress has found that all of these various abuses and evils occur and are spread and perpetuated through the mails and the channels of interstate commerce. And Congress has further found that such interstate activities, which grow out of the ownership of securities of operating companies, have caused public utility holding companies to be "affected with a national public interest." § 1(a).[12]

The ownership of securities of operating companies, then, has a real and intimate relation to the interstate activities of holding companies and cannot be effectively divorced therefrom. That ownership is the generating force of the constant interstate flow of reports, letters, equipment, securities, accounts, instructions and money—all of which constitute the life blood of holding companies and allow the numerous abuses to be effectuated. It also makes the interstate transmission of gas and electricity by the subsidiaries, as well as their other interstate actions, reflect upon and magnify the interstate character of the holding companies. Without the factor of stock ownership the very foundation and framework of holding company systems would be gone and the amount of their interstate activity would be at a minimum; centralized management and control of widely scattered utility properties would be difficult if not impossible.

We may assume without deciding that the ownership of securities, considered separately and abstractly, is not commerce. But

[11] The congressional findings as to abuses listed in § 1(b), were based upon some of the most exhaustive and comprehensive studies ever to underlie a federal statute. Congress specifically referred in § 1(b) to the studies made by the Federal Trade Commission pursuant to S. Res. 83, 70th Cong., 1st Sess., the reports of the House Committee on Interstate and Foreign Commerce made pursuant to H. Res. 59, 72nd Cong., 1st Sess., and H. J. Res. 572, 72nd Cong., 2d Sess. A summary of the manifold and complex abuses revealed by these studies is contained in the Federal Trade Commission Report, *supra*, note 7. See Barnes, The Economics of Public Utility Regulation (1942), p. 71.

[12] The fact that § 1(a) refers to certain activities of holding companies as "often" occurring in or affecting interstate commerce and that § 1(b) refers to adverse effects "when" certain abuses and evils occur is but an instance of careful draftsmanship. Contrary to North American's contentions, the use of the words "often" and "when" does not imply that Congress felt that the relationships of some holding companies to commerce were negligible or that the abuses were other than general in nature. Those words merely recognize that interstate activities are not necessarily constant and that the abuses may arise from time to time. That is enough, however, to support legislative action. See Chicago Board of Trade v. Olsen, 262 U. S. 1, 40.

when it is considered in the context of public utility holding companies and their subsidiaries, its relationship to interstate commerce is so clear and definite as to make any other conclusion unreasonable. And Congress has plainly recognized that relationship in its declarations of policy in § 1(a), in its enumeration of abuses in § 1(b) and in its description of interstate activities of holding companies in § 4(a). Such statements would be utterly meaningless in the light of reality were they not premised upon the ownership of securities by holding companies and the use of that ownership to burden and affect the channels of interstate commerce.

Section 11(b)(1) is concerned with, and operates directly upon, this ownership of securities. In § 1(b)(4) Congress specifically found that the national public interest, the interest of utility investors and the interest of utility consumers are or may be adversely affected "when the growth and extension of holding companies bears no relation to economy of management and operation or the integration and coordination of related operating properties."[13] The "growth and extension of holding companies" obviously rest upon their security holdings. Congress expressed in § 1(c) its determination "to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems," thus eliminating the evil complained of in § 1(b)(4) and ameliorating the conditions specified in the other subsections of § 1(b). It accordingly adopted § 11(b)(1), whereby holding companies are compelled to integrate and coordinate their systems and to divest themselves of security holdings of geographically and economically unrelated properties. In this way Congress hoped to rejuvenate

[13] "The growth of the holding company systems has frequently been primarily dictated by promoters' dreams of far-flung power and bankers' schemes for security profits, and has often been attained with the great waste and disregard of public benefit which might be expected from such motives. Whole strings of companies with no particular relation to, and often essentially unconnected with, units in an existing system have been absorbed from time to time. The prices paid for additional units not only have been based upon inflated values but frequently have been run up out of reason by the rivalry of contending systems. Because this growth has been actuated primarily by a desire for size and the power inherent in size, the controlling groups have in many instances done no more than pay lip service to the principle of building up a system as an integrated and economic whole, which might bring actual benefits to its component parts from related operations and unified management. Instead, they have too frequently given us massive, overcapitalized organizations of ever-increasing complexity and steadily diminishing coordination and efficiency." Report of the National Power Policy Committee on Public-Utility Holding Companies, H. Doc. 137, 74th Cong., 1st Sess., p. 5.

local utility management and to restore effective state regulation, both of which had been seriously impaired by the existence and practices of nation-wide holding company systems.[14]

The constitutionality of § 11 (b) (1) under the commerce clause thus becomes apparent. For nearly one hundred and twenty-five years, this Court has recognized that the power of Congress over interstate commerce is "the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons* v. *Ogden*, *supra*, 196. This is not to say, of course, that Congress is an absolute sovereign. It is limited by express provisions in other parts of the Constitution, such as Section 9 of Article I and the Bill of Rights. But so far as the commerce clause alone is concerned Congress has plenary power, a power which "extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations." *The Minnesota Rate Cases*, *supra*, 399.

This broad commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy. Rather it is an affirmative power commensurate with the national needs. It is unrestricted by contrary state laws or private contracts. And in using this great power, Congress is not bound by technical legal conceptions. Commerce itself is an intensely practical matter. *Swift & Co.* v. *United States*, 196 U. S. 375, 398. To deal with it effectively, Congress must be able to act in terms of economic and financial realities. The commerce clause gives it authority so to act.

We need not attempt here to draw the outer limits of this plenary power. It is sufficient to reiterate the well-settled principle that Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil, whether of a physical, moral or economic nature.

[14] "As has been pointed out above, the purpose of section 11 is simply to provide a mechanism to create conditions under which effective Federal and State regulation will be possible. It is therefore the very heart of the title, the section most essential to the accomplishment of the purposes set forth in the President's message." S. Rep. 621, 74th Cong., 1st Sess., p. 11.

Brooks v. *United States*, 267 U. S. 432, 436-437. This power permits Congress to attack an evil directly at its source, provided that the evil bears a substantial relationship to interstate commerce. Congress thus has power to make direct assault upon such economic evils as those relating to labor relations, *National Labor Relations Board* v. *Jones & Laughlin Co.*, 301 U. S. 1, *Polish Alliance* v. *National Labor Relations Board*, 322 U. S. 643; to wages and hours, *United States* v. *Darby*, *supra*; to market transactions, *Stafford* v. *Wallace*, 258 U. S. 495; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1; and to monopolistic practices, *Northern Securities Co.* v. *United States*, *supra*. The fact that an evil may involve a corporation's financial practices, its business structure or its security portfolio does not detract from the power of Congress under the commerce clause to promulgate rules in order to destroy that evil. Once it is established that the evil concerns or affects commerce in more states than one, Congress may act. "The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge." *In re Rahrer*, 140 U. S. 545, 562.

Congress in § 11(b)(1) of the Public Utility Holding Company Act was concerned with the economic evils resulting from uncoordinated and unintegrated public utility holding company systems. These evils were found to be polluting the channels of interstate commerce and to take the form of transactions occurring in and concerning more states than one. Congress also found that the national welfare was thereby harmed, as well as the interests of investors and consumers. These evils, moreover, were traceable in large part to the nature and extent of the securities owned by the holding companies. Congress therefore had power under the commerce clause to attempt to remove those evils by ordering the holding companies to divest themselves of the securities that made such evils possible.

It follows that North American's contention that the ownership of securities is not in itself interstate commerce and hence may not be made the basis of federal legislation misconceives the issue in this case. Precisely the same misconception was made more than forty years ago by the appellants in *Northern Securities Co.* v. *United States*, *supra*, 334-335, and was rejected by this Court. Inasmuch as Congress may protect the freedom of interstate commerce by any means that are appropriate and that are lawful and not prohibited by the Constitution, this Court in

the *Northern Securities Co.* case recognized that Congress may deal with and affect the ownership of securities in order to protect the freedom of commerce. Congress likewise has the power in this case.

In fashioning the remedy decreed by § 11(b)(1), Congress was following a pattern set many years ago by decisions applying the Sherman Antitrust Act, *Northern Securities Co.* v. *United States*, *supra*; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *Continental Ins. Co.* v. *United States*, 259 U. S. 156, and the commodities clause of the Hepburn Act, *United States* v. *Lehigh Valley Railroad*, 220 U. S. 257; *United States* v. *Delaware, Lackawanna & Western Railroad Co.*, 238 U. S. 516. In so affecting the corporate structure of holding companies, it was exercising its power "to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety." *Dayton-Goose Creek Railway Co.* v. *United States*, 263 U. S. 456, 478. It is clear, therefore, that § 11(b)(1) is invulnerable to attack under the commerce clause.

The constitutionality of § 11(b)(1) is also questioned from the standpoint of the due process clause of the Fifth Amendment. North American argues that this section, by compelling it to divest itself of its scattered subsidiaries and to confine its operations to a single integrated system, involves a taking of property without just compensation. It is also claimed that such evils as were found to exist in public utility holding companies find an adequate remedy in other sections of the Act and that § 11(b)(1) is therefore inappropriate. Neither contention is meritorious.[15]

The taking of property is said to involve "a vast destruction of values." Reference is made in this respect to the valuable right of North American's shareholders to pool their investments and thereby obtain the benefit alleged to flow from efficient, common management of diversified interests. But Congress balanced the various considerations and concluded that this right is clearly outweighed by the actual and potential damage to the public, the investors and the consumers resulting from the use made of pooled investments. Under such circumstances, whatever value this right

[15] The contention also is made that the fact that § 11(b)(1) requires disposition of security holdings and the termination of relationships which antedate the passage of the Act is fatal to its validity. But it merely requires that such holdings and relationships shall not continue in the future. There is no punishment for past events. Certainly there is no constitutional requirement that the status quo be maintained. See United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 342.

may have does not foreclose the protection of the various interests which Congress found to be paramount. See *Northern Securities Co.* v. *United States, supra.* Nor does the value of North American's contributions as a holding company to the earning power and intrinsic value of the assets divested pursuant to § 11(b)(1) bar Congress from requiring such divestment. Congress has concluded from the extensive studies made prior to the passage of the Act that the economic advantages of a holding company at the top of an unintegrated, sprawling system are not commensurate with the resulting economic disadvantages. The reasonableness of that conclusion is one for Congress to determine. The fact that valuable interests may be affected does not, by itself, render invalid under the due process clause the determination made by Congress.

Moreover, there is no basis here for assuming that in limiting the scope of North American's operations there will be dispositions of securities for inadequate considerations, thereby raising a question as to whether there is a destruction of these values without just compensation. The Act does not contemplate or require the dumping or forced liquidation of securities on the market for cash.[16] Under §§ 11(d) and 11(e) of the Act, any divestment or reorganization plan must meet the standards of fairness and equitableness. In many instances this may involve no more than a distribution of the securities among the existing shareholders of the holding company.[17] But should securities be sold for cash, speculation as to unfavorable market conditions cannot undermine the validity of § 11(b)(1). Any plan of divestment or reorganization, moreover, must be carefully scrutinized by both the Commission and the enforcing court, thus enabling the assertion and protection of all shareholders' rights. See *Otis & Co.* v. *Securities*

[16] "As has been explained above, the title does not require the dumping or forced liquidation of securities. Such disposition as may be necessary can be accomplished by reorganization which will equitably redistribute securities among existing security holders. Insofar as there may be some redistribution of the securities of operating companies through investment banking channels, this will not result in a substantial net increase in the supply of utility securities on the market because for every block of operating securities distributed there will be a corresponding block of holding company securities retired. The net effect of such changes will be to strengthen the market for utility securities generally by replacing holding company securities with sound operating company securities. Such operations, primarily of a refunding nature, should strengthen rather than weaken the credit of operating companies." S. Rep. 621, 74th Cong., 1st Sess., p. 16.

[17] North American has already disposed of its holdings of Detroit Edison Company common stock under a plan distributing the stock to North American's stockholders over a period of time. In re The North American Company, Holding Company Act Release No. 4056.

and Exchange Commission, 323 U. S. 624. And there are provisions in the Act guarding against unduly rapid divestment or liquidation.[18] In the light of such statutory and judicial safeguards and in the absence of any alleged unfair plan of divestment, we cannot say that North American's shareholders are adversely affected, from a constitutional standpoint, by the operation of § 11(b)(1). North American's reliance on such cases as *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, is therefore misplaced.

It is true, as North American points out, that other sections of the Act provide for the regulation of many activities of holding companies and their subsidiaries, activities that were found to give birth to many of the evils about which Congress was concerned. But such sections regulate future transactions, whereas § 11(b)(1) is concerned with the existing structures of holding company systems. These structures in and of themselves have been found by Congress to constitute an evil that cannot be met by simply regulating future transactions. Congress, in the exercise of its discretion, has decided that it is necessary to reorganize the holding company structures. And inasmuch as it has the constitutional power to do so, we cannot question the appropriateness or propriety of its decision. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 394.

Finally, North American claims that it has engaged in none of the evils enumerated in § 1(b) and that it should be allowed to prove that fact. The contention apparently is that § 11(b)(1), as applied to North American, is unconstitutional since none of the evils that led Congress to enact the statute are present in this instance. But if evils disclosed themselves which entitled Congress to legislate as it did, Congress had power to legislate generally, unlimited by proof of the existence of the evils in each particular situation. Section 11(b)(1) is not designed to punish past offenders but to remove what Congress considered to be potential if not actual sources of evil. And nothing in the Constitution prevents Congress from acting in time to prevent potential injury to the national economy from becoming a reality.

The judgment of the court below is accordingly

Affirmed.

Mr. Justice REED, Mr. Justice DOUGLAS and Mr. Justice JACKSON took no part in the consideration or decision of this case.

[18] Under § 11(c), holding companies are given at least a year to comply with an order of the Commission under § 11(b). The Commission is also authorized to extend the time for an additional year upon a proper showing.